Supreme Court, U.S.
FILED
OCT 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-451

In The

Supreme Court of the United States

October Term, 1990

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,

Petitioner,

v.

JUNE M. BETTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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1. The principal thrust of Respondent's opposition to the issuance of a writ of certiorari is Congress' recent amendment of the Age Discrimination in Employment Act ("ADEA") with the stated intention of reversing the effects of the Court's decision in *Public Employees Retirement System of Ohio v. Betts*, ___ U.S. ___, 109 S.Ct. 2854 (1989) (*"PERS v. Betts"*). *See* Older Workers Benefit Protection Act ("OWBPA") (at A-6 - A-19 of the appendix to Respondent's Brief in Opposition). That Congress amended the ADEA has no bearing on this case or others similar to it, however, because neither the amendments to

the ADEA nor this Court's opinion in *PERS v. Betts* directly addresses involuntary retirement, the issue now before the Court. As a result, the terms of the OWBPA are not dispositive of this case.

2. An additional reason why Respondent's reliance on the amendments to the ADEA is misplaced is that three provisions of the OWBPA make clear that for many of the nation's employee benefit plans, including the one provided by Petitioner, *PERS v. Betts* continues to be binding precedent. First, Section 104(a)(1) of the OWBPA proclaims that "this title shall apply *only* to . . . any employee benefit established or modified on or after the date of enactment of this Act . . . " (emphasis added). Second, Section 104(b) exempts, until as late as June 1, 1992, collectively bargained agreements from the scope of the OWBPA. Finally, Section 104(c) directs that the amendments do not affect states or their political subdivisions "until the date that is 2 years after the date of enactment of this Act."

The unmistakable message of these provisions is that Congress determined that the OWBPA should not apply to this case or other litigation pending at the time of the OWBPA's passage and that for the next two years this Court's decision in *PERS v. Betts* constitutes the law of the land with respect to all employee benefit plans offered by state and local governments or in accordance with union-negotiated contracts. Thus, by characterizing legal employer conduct (offering different benefits to older and younger workers) as involuntary retirement, the lower court's decision threatens to instigate the type of litigation the foregoing provisions serve to discourage. Over the next two years public and private employers

throughout the United States will be vulnerable to lawsuits designed to circumvent *both* the Court's decision in *PERS v. Betts* and Congress' determination not to give the OWBPA retroactive application. This Court should exercise its jurisdiction, therefore, in order to give full effect to *PERS v. Betts* as well as the dictates of Congress.

3. Respondent hopes to dissuade the Court from granting a writ of certiorari in this case by framing the Sixth Circuit's decision as narrowly as possible. Nothing better reflects the pervasive scope of the lower court's holding, however, than the following passage:

> Even though she retired for health reasons, [Betts] was not given the choice of disability benefits solely because of her age. This denial, not her initial retirement, is what makes the §4(f)(2) defense inapplicable.

Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities, Case Nos. 86-3676/4034 (6th Cir. March 26, 1990) (at A-7 in appendix to Petition for Writ of Certiorari). The appellate court clearly condemned as involuntary retirement a denial of benefits that occurred subsequent to Respondent's voluntary decision to retire because of poor health. The leave of absence provision in Ohio law cited by Respondent is a component of Ohio's retirement plan and does not even become an issue until *after* an individual (1) decides to retire and (2) is placed on retired status. Because the leave of absence provision affects an individual only *after* he is retired, the legality of the provision must be analyzed under the "subterfuge" prong of §4(f)(2) (29 U.S.C. §623(f)(2)), not the involuntary retirement prong.

That the Sixth Circuit may have taken this post-retirement issue into consideration only emphasizes the weakness of the lower court's analysis. Indeed, Respondent implicitly acknowledges in her brief in opposition that any controversy surrounding the leave of absence provision is a smoke screen for what the court of appeals was attempting to accomplish and what Respondent actually seeks as relief: "a decision for Betts will entitle her to the increased benefits that come with the disability program." Brief in Opposition at 7 Although Respondent claims that she was injured by her ineligibility for the leave of absence provision, the relief she seeks is the higher pension benefit this Court already has stated PERS is not legally obligated to offer her. In reality, Respondent's case is nothing more than a discredited claim for benefits transformed into a meritless charge of involuntary retirement. Nothing in the language of the ADEA or case law justifies the lower court's determination that Respondent was involuntarily retired because, after her voluntary decision to retire, she was placed in the "less desirable [of two] retirement programs on the basis of age." *See* opinion of Sixth Circuit at A-8 of Petition for Writ of Certiorari. Such a conclusion is inconsistent with this Court's decision in *PERS v. Betts* and could be relied on by plaintiffs across the country to wrongfully impose liability on employers.

4. In its petition for a writ of certiorari, Petitioner cited decisions from the First, Third and Seventh Circuits as opinions in conflict with the decision authored by the court below. *See Equal Employment Opportunity Commission v. State of Maine*, 644 F. Supp. 223 (D. Me. 1986), *aff'd mem.*, 823 F.2d 542 (1st Cir. 1987); *Equal Employment*

Opportunity Commission v. Westinghouse Electric Corporation, 907 F.2d 1365 (3d Cir. 1990); *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987). Respondent, in her brief in opposition, suggests that there are procedural grounds for ignoring the conflict between the Sixth Circuit's opinion and those of the First and Third Circuits.

Initially, Respondent notes that the First Circuit's decision in *Maine* is unpublished. The fact that one of the opinions in conflict is unpublished, however, has never been an obstacle to the issuance of a writ of certiorari. *See, e.g., Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454 (1987); *United States v. Rojas-Contreras*, 474 U.S. 231 (1985).

Next, Respondent points out that panel rehearing has been granted by the Third Circuit in *Westinghouse*. Any scrutiny of the Third Circuit's order, however, reveals that rehearing has been granted to reconsider only whether the employee benefit plan in question was a subterfuge to evade the ADEA (A-3 - A-5 of the appendix to Respondent's Brief in Opposition). Rehearing was not granted with respect to whether the plan permitted involuntary retirement because of age. Consequently, the fact that *Maine* is unpublished and that *Westinghouse* is being reheard should not interfere with the issuance of a writ of certiorari in this case.

5. Respondent refers to a letter from the director of the Ohio Retirement Study Commission ("Commission"), a body without legislative authority, to Senator Metzenbaum, thanking the Senator for supporting the version of the OWBPA eventually passed by Congress, in which the

amendments to the ADEA do not apply retroactively and in which public plans are given two years to comply with the new law. The letter also states the obvious: Ohio will, as is required of every other public and private employer in the United States, take steps to bring its employee benefit plans into compliance with the OWBPA. This letter from a non-party is hardly grounds for denying certiorari in this case.

CONCLUSION

For the preceding reasons, as well as those previously presented, the Court is urged to issue a writ of certiorari in this case. Moreover, it is suggested that under the circumstances summary reversal is in order.

Respectfully submitted,

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